82-1727

NO._____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

SAMUEL THOMAS RICKMAN,
Appellant,

v.

STATE OF GEORGIA,
Appellee.

ON APPEAL FROM
THE SUPREME COURT OF GEORGIA

MOTION TO DISMISS OR AFFIRM

MARY BETH WESTMORELAND
Assistant Attorney General
Counsel of Record

MICHAEL J. BOWERS
Attorney General

MARION O. GORDON
First Assistant
Attorney General

WILLIAM B. HILL, JR.
Senior Assistant
Attorney General

Please serve:

MARY BETH WESTMORELAND
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3349

QUESTIONS PRESENTED

1.

Did the Court of Appeals of Georgia decline to consider any constitutional challenge raised based on an adequate and independent state ground, thus precluding the Appellant from asserting an appropriate jurisdictional base in this Court?

2.

Should the instant appeal be dismissed or affirmed because the question upon which the case depends is unsubstantial and does not need further argument?

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PART ONE

THE STATUTE INVOLVED AND THE NATURE OF THE CASE

A. THE STATUTE

In this appeal, the Appellant attempts to bring into question the

validity of the Georgia statute on parties to a crime. Under O.C.G.A. § 16-2-20; Ga. Code Ann. § 26-801, "[e]very person concerned in the commission of a crime is a party thereto and may be charged with and convicted of commission of the crime." The statute then goes on to define what is meant by "concerned in the commission of a crime." A person is considered to be a party to the crime if he directly commits the crime, intentionally causes some other person to commit the crime under facts that would render the other person not guilty of a crime, intentionally aids or abets in the commission of a crime or intentionally advises, encourages, hires, counsels, or procures another to commit the crime. Id.

Georgia law further provides that once it is determined that a person is a party to a crime, even though he did not directly commit the crime, he may be indicted, tried and convicted for the commission of the crime even though the person who directly committed the crime has not been prosecuted or convicted. O.C.G.A. § 16-2-21; Ga. Code Ann. § 26-802.

Appellant in the instant action has challenged these particular provisions of the Georgia law, asserting that he raised such a challenge in the lower courts. Appellant has also challenged the applicability of these code sections to him under the facts of the instant case.

B. THE PROCEEDINGS BELOW

The Appellant and two co-defendants, Ellis and Hoskins, were jointly tried and convicted of possession of cocaine in the Superior Court of Cobb County, Georgia. The evidence at trial indicated that an undercover police officer made arrangements to purchase a quantity of cocaine from Hoskins. A meeting was held between Hoskins and the undercover officer, after which the two proceeded to a motel in Atlanta to meet with people that were arriving from Alabama to complete the deal.

The undercover officer and a companion of Hoskins rented adjoining rooms at the motel. There were surveillance teams stationed nearby who

observed the Appellant and Ellis arrive in a car with Alabama tags. The two men parked next to Hoskins' automobile. The Appellant and Ellis went into the motel, returned to the car and retrieved a brown briefcase from the car. The two men then returned to the motel.

During this time, the undercover officer had seen a pound of cocaine and had been told the remainder of the kilogram which was to be a part of the deal between Hoskins and the undercover officer was present. The undercover officer went to his car to obtain money for the purchase. This action was a prearranged signal for the surveillance team to assemble.

The officers gained access to one motel room using the undercover police

officer's key and arrested Hoskins and confiscated one pound of cocaine. When they knocked at the room next door and announced their identity as police officers, they heard sounds of running water and a repeatedly flushed toilet. The officers used the manager's pass key and entered the room. They found Ellis standing by the door and found Rickman in the bathroom with an empty plastic bag. Later scrapings from the toilet bowl and the residue of the plastic bag were identified as cocaine. A search of the room also revealed a glass vial between the mattress and box springs of the bed containing cocaine and also a plastic bag in a shaving kit which was also identified as containing cocaine.

Hoskins pled entrapment at trial, whereas the Appellant and Ellis asserted a defense that they had no knowledge that any drug deal was taking place. The trial court denied a motion for severance prior to trial. No challenge was made to the parties to a crime statute at any time during the trial.

Appellant alleges that he raised this issue on the motion for a new trial, but has not cited to the portion of the record where this objection was made. In any event, Appellant raised as an issue on direct appeal a challenge to the parties to a crime statute. Appellant asserted in his brief that the law was unconstitutional on its face and as applied, particularly focusing on the

application of the law to the instant case. No citation was given by the Appellant to any authority supporting his argument that the statute was unconstitutional.

The Court of Appeals of Georgia considered the allegation raised by the Appellant. The Court held,

> Because Appellant made no constitutional objections to either the charge or the statute at trial, we will not address his enumeration other than to note that the Supreme Court held that Code Ann.

§§ 26-801 and
26-802 were not
unconstitutionally
vague, indefinite,
and overbroad in
Wanzer v. State,
232 Ga. 523 (6)
(207 S.E.2d 466).

Rickman v. State, 164 Ga. App. 366, 372, 296 S.E.2d 726 (1982). Therefore, the Court of Appeals of Georgia specifically determimed that the Appellant had not properly raised the objection to the constitutionality of the statute and concluded that it was not properly before the court for review. Appellee submits that tne Court of Appeals of Georgia, therefore, did not rule on this issue. The court subsequently

affirmed the convictions and sentences of all codefendants. Rickman, supra. A motion for rehearing was denied by that court on November 12, 1982.

Appellant subsequently filed a petition for a writ of certiorari in the Supreme Court of Georgia which was denied on January 5, 1983. The motion for reconsideration was denied on January 25, 1983.

Appellant now seeks to assert appellate jurisdiction in this Court raising an issue which the Appellee submits was not addressed by the state courts.

PART TWO

ARGUMENT

A. LACK OF APPELLATE JURISDICTION.

This Court has jurisdiction to review on appeal, as opposed to a petition for a writ of certiorari, decisions of state courts under 28 U.S.C. § 1257. Appellant seeks to assert the jurisdiction of this Court under the provision stating that this Court has jurisdiction "where it is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity." 28 U.S.C. § 1257 (2).

Certain qualifications to this rule have been established by this Court restricting jurisdiction in certain cases. In cases in which the sole federal question presented to this Court has never been raised, preserved or passed on in the state courts, this Court will not exercise jurisdiction. Cardinale v. Louisiana, 394 U.S. 437 (1969). In that case this Court went on to hold as follows:

> Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with

those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground.[sic]

Id. at 439. This Court further pointed out that if there was no state procedure available for considering the issue there would still be the opportunity for federal habeas corpus review and, thus, no need for this Court to exercise its jurisdiction.

Appellant has cited this Court to the decision in Wright v. Georgia, 373 U.S. 284 (1963), in support of his proposition that this Court should exercise jurisdiction. In that decision, a challenge to the constitutionality of the state statute had plainly been raised at trial based on a demurrer to the accusation. Further, the issue was raised on the motion for a new trial and on appeal.

The Supreme Court of Georgia concluded that counsel had not insisted upon the issue on appeal and the court did not address the issue, because it was not explicitly identified in the brief. Under that particular factual situation, this Court concluded that the state ground which served as a basis for the decision was inadequate and that the defendant was not fairly apprised of the existence of the procedural rule. This does not restrict the use of an adequate state ground to preclude consideration of a particular issue.

In the instant case even though Appellant asserts that he challenged the statute in question by means of an objection to the charge of the court at trial, no objection is shown which

indicates that the constitutionality of the code section was ever called into question.

The trial court charged concerning parties to a crime as follows:

> Every person concerned in the commission of a crime is a party thereto, and may be charged with and convicted of commission of the crime. . . . [A] person is concerned in the commission of a crime only if he. . . directly commits the crime, . . . intentionally

> aids, abets in the commission of a crime, or. . . intentionally advises, encourages, hires, counsels, or procures another to commit the crime.

(T. 1090).

The Court then went on to charge that the mere knowledge of a defendant of illegal acts which may have been committed does not make such a defendant a party to the crime. The court further charged that the mere fact that a defendant knew the other defendants during the time of the alleged criminal activity would not be sufficient to support the charge of

possession of controlled substances. (T. 1091). At no time was the trial court given the opportunity to rule on the constitutionality of the Georgia statute pertaining to parties to a crime.

In the instant case, the Court of Appeals of Georgia specifically noted that no constitutional objection was made at trial to either the charge or the statute and, thus, the court would not address the issue other than to note prior decisions by the Supreme Court of Georgia. Rickman v. State, 164 Ga. App. at 372.

Contrary to Appellant's assertion, this reasoning is supported by State procedural rules which bar the consideration on direct appeal of the constitutionality of a statute which

was not challenged at trial. The Court of Appeals of this State has decided that constitutional issues first raised on appeal present nothing for review by that court. Corley v. State, 154 Ga. App. 301, 268 S.E.2d 76 (1980). Prior to that time, the Supreme Court of Georgia had ruled that a constitutional question would not be considered by that court, because it was raised for the first time in a motion for new trial and, thus, came too late for review. Thrall v. State, 226 Ga. 308, 174 S.E.2d 925 (1970). Therefore, it is clear that there is a specifically established state procedural rule requiring that constitutional issues be raised at trial before the state Supreme Court will consider these issues.

It is further important to note that this appeal is not the Appellant's last opportunity to present this issue for review. As this Court has noted in its prior cases, a petition for a writ of habeas corpus in federal court is an available avenue for relief in these types of situations. Furthermore, Appellant has not sought to raise this issue in a state habeas corpus proceeding and could conceivably raise the issue at that time. See Hammock v. Zant, 243 Ga. 259, 253 S.E.2d 727 (1979). Therefore, Appellee submits that this Court does not have jurisdiction to consider the instant case as the state courts have not addressed the constitutional issue raised.

B. LACK OF A SUBSTANTIAL FEDERAL QUESTION.

Even if this Court concludes that the issue raised has been properly raised in the state courts, Appellee submits that this Court should dismiss the instant appeal or affirm the conviction based on the lack of a substantial federal question for consideration. It is essential to the jurisdiction of this Court under 28 U.S.C. § 1257 that a substantial federal question be properly raised in state court proceedings. The issue must be more than a mere formality and must not be frivolous or be foreclosed by prior decisions such as to leave no room for controversy. Appellee submits that the issue presented in

the instant case does not present such a substantial federal question as is required by law in order for this Court to exercise its jurisdiction.

Appellant has challenged O.C.G.A. §§ 16-2-20 and 16-2-21; Ga. Code Ann. §§ 26-801 and 26-802 as being unconstitutional. Appellant asserts that under the statutes providing for the conviction of a party to a crime, a person could not be on notice as to the nature of the charges against him or as to the punishment to which he would be submitted.

This Court has held:

> The constitutional requirement of definiteness is violated by a criminal statute

> that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.

United States v. Harriss, 347 U.S. 612, 617 (1953). Subsequent to that decision, this Court again asserted the applicable principle stating, "we insist that laws give the person of ordinary intelligence a reasonable

opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning." Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

In reviewing the challenged statute under the above standards, it is clear that the statute sets forth with sufficient specificity conduct which is forbidden and sufficiently informs a defendant of conduct which would be prohibited by the law. See Wanzer v. State, 232 Ga. 523, 207 S.E.2d 466 (1974). Appellee submits that the statute challenged by the Appellant is clearly not vague and not overbroad and is sufficiently definite to protect a person of ordinary intelligence. The terms of the

statute furnish a test based on criteria known to men of common intelligence so that those who come in contact with the statute could determine the proscriptions of that statute with reasonable accuracy. Therefore, Appellee submits that the issue presented in the instant case is clearly frivolous as the statute is not unconstitutional in any manner. Therefore, no substantial federal question is presented for review by this Court.

PART THREE

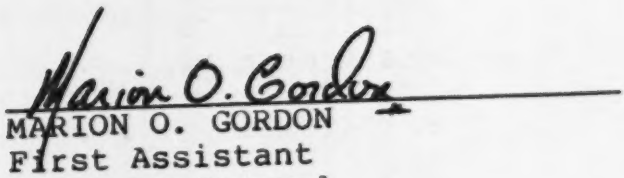
CONCLUSION

Appellee respectfully submits that no jurisdictional basis has been shown to justify this Court's consideration of this issue. Furthermore, Appellee submits that the question upon which this case depends is so insubstantial as to not need further argument. Therefore, Appellee moves this Court to either dismiss the instant appeal or, in the alternative, to affirm the judgment entered by the courts of Georgia.

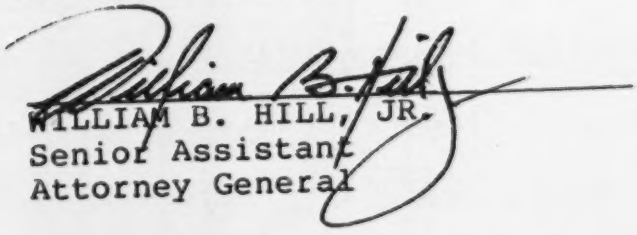
Respectfully submitted

MICHAEL J. BOWERS
Attorney General

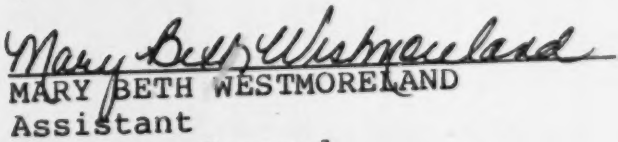
(Signatures continued)



MARION O. GORDON
First Assistant
Attorney General



WILLIAM B. HILL, JR.
Senior Assistant
Attorney General



MARY BETH WESTMORELAND
Assistant
Attorney General
Counsel of Record
for the Appellee

Please serve:

MARY BETH WESTMORELAND
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3349

CERTIFICATE OF SERVICE

I, Mary Beth Westmoreland, a member of the Bar of the Supreme Court of the United States and counsel of record for the Appellee, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Motion to Dismiss or Affirm upon counsel for the Appellant by depositing a copy of same in the United States mail with proper address and adequate postage to:

Robert L. Barr, Jr.
120 South Park Square
Marietta, Georgia 30060

This 24th day of May, 1983.

/s/
MARY BETH WESTMORELAND
Assistant
Attorney General